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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 66

ESTATE OF HENRY H. ROGERS, deceased, ADRIAN H. LARKIN, ALBERT STICKNEY, and CENTRAL HANOVER BANK AND TRUST COMPANY, Executors,

Petitioners,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS

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October, 1943.

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Circuit Court of Appeals (R. 113) is reported at 135 F.(2d) 35. The opinion of the Tax Court of the United States (R. 25) is unreported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 19, 1943 (R. 122). The petition for a writ of certiorari was filed May 20, 1943, and granted June 21,

1943 (R. 123). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938).

Statement of the Case

All of the facts herein have been stipulated (R. 25, 46-50).

Henry H. Rogers died on July 25, 1935, a resident of Southampton, Suffolk County, New York, leaving a Will (R. 60-76) which was duly admitted to probate by the Surrogate's Court of said County and State on October 28, 1935 and on which letters testamentary were duly granted on the same day to Adrian H. Larkin, Albert Stickney and Central Hanover Bank and Trust Company (R. 46).

The father of said decedent, Henry H. Rogers, Sr., died on May 19, 1909, a resident of the City, County and State of New York, leaving a Will (R. 53-59) which was duly admitted to probate by the Surrogate's Court of said County and State on May 28, 1909. By said Will, Henry H. Rogers, Sr. created a trust for the benefit of his son, consisting of one-fourth of his residuary estate. His Trustees were directed to apply the income of said trust to the use of said son until he should attain the age of forty years, and at that time to convey to said son one-half of the principal of said trust. Decedent attained the age of forty years on December 28, 1919 and shortly thereafter the share of said trust to which he then became entitled was paid over to him. The Will of Henry H. Rogers, Sr. further provided that the Trustees should apply the income of the remaining one-half of said trust to the use of said son during his lifetime and upon his death that they should "convey, transfer and pay over the principal thereof to such persons or corporations and in such manner as the said child shall direct by his Last Will and Testament, or, in the absence of such direction, to such persons as shall then constitute the heirs at law of the said child, as in the case of the inheritance of

real property, according to the laws of the State of New York" (R. 46-47).

By Articles Twelfth and Sixteenth of his Will, decedent exercised the power of appointment over the balance of said trust (R. 47). It was determined by decree of the Surrogate's Court of the County of New York, dated January 12, 1939 (R. 77-110), that 6.667% of the corpus of said trust had been validly appointed under Article Sixteenth of decedent's Will in equal shares outright to decedent's widow, Pauline V. Hoving, his daughter, Millicent, and his grandson, Peter. It was also determined by said decree that decedent had validly appointed the balance of the corpus of said trust remaining after payment of said 6.667% as follows: One-third thereof under Article Twelfth of his Will in trust for the benefit of his widow; one-third thereof under Article Twelfth of his Will in trust for the benefit of his daughter; and the remaining one-third thereof under Article Sixteenth of his Will outright to his grandson. The question presented herein does not involve in any way the portion of the appointed property which passed to decedent's grandson.

The "heirs at law" of decedent "as in the case of the inheritance of real property, according to the laws of the State of New York" within the provisions of the Will of decedent's father were his widow, his daughter and his son, Henry H. Rogers, Jr., who would have taken decedent's real property in equal shares if he had not left a Will (R. 49). Thus decedent's widow, his daughter and his son, if the power of appointment had not been exercised, would each have taken one-third of said trust outright. Under the exercise of the power of appointment by Articles Twelfth and Sixteenth of decedent's Will, his widow and his daughter each took one-third of 6.667% of said trust outright and each took a life interest in the income of one-third of the balance of said trust. No part of said trust was given to decedent's son.

Using the figures and factors stipulated (R. 49, 50), the values of the life interests of decedent's widow and daughter in said trust as of the date of decedent's death were as follows:

Net value of trust	$8,428,949.60
Less: 6.667% thereof	561,958.08
Balance	$7,866,991.52
One-third thereof	$2,622,330.50
Life interest of widow ($2,622,330.50 x .57143)	$1,498,478.32
Life interest of daughter ($2,622,330.50 x .67383)	$1,767,004.96

It thus appears that decedent's widow and daughter received the following property or estates:

In the case of the widow:

Value of property passing outright	$ 187,319.36
Value of life estate	1,498,478.32
Or a total value of	$1,685,797.68

In the case of the daughter:

Value of property passing outright	$ 187,319.36
Value of life estate	1,767,004.96
Or a total value of	$1,954,324.32

The Board of Tax Appeals (now the Tax Court of the United States and hereinafter referred to as the Tax Court) adopted the stipulation of facts in its entirety, together with the exhibits attached thereto, as its findings of fact (R. 25). It held that the aggregate of $3,640,122 which went to the widow and daughter under the exercise of the power was

less than they would have received had there been no exercise of the power, and accordingly excluded said amount from decedent's gross estate for federal estate tax purposes (R. 26).

The Circuit Court of Appeals for the Second Circuit reversed the order of the Tax Court (R. 122). Two of the Circuit Judges, Frank and Learned Hand, wrote separate opinions (R. 114-122); Judge Chase noted his concurrence in the result without joining in either of the separate opinions (R. 122).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In reversing the decision of The Tax Court of the United States;

2. In failing to hold that the effect of the exercise by decedent of the power of appointment given to him by his father's Will was merely to reduce the already vested estates of his wife and daughter under the Will of his father and that no property passed to his widow and daughter under his exercise of the power;

3. In holding that the property or estates of the widow and daughter of the decedent in the trust created under the Will of decedent's father should be included as a part of decedent's gross estate for Federal Estate Tax purposes.

ARGUMENT

The effect of the exercise by decedent of the general power of appointment given to him by his father's Will was to reduce the already vested estates which decedent's wife and daughter had under the Will of decedent's father and, accordingly, no property passed to decedent's widow or daughter under the exercise of the power within the purview of the Revenue Act.

Section 302 of the Revenue Act of 1926, as amended, provides in part as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . .
>
> • • • •
>
> "(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will . . ."

The only question this case presents is: Did the property which went to the widow and daughter pass, within the meaning of the Act, under the general power of appointment exercised by the decedent by his Will? No claim has ever been made that the power was not a general power or that it was not exercised.

The legislative history of the above and prior Revenue Acts sheds no light as to the intended meaning of the word "passing." 1 Paul, *Federal Estate and Gift Taxation*, 413-416. Obviously, however, Congress intended, because it so stated in the Act, that the estate tax should attach as the consequence of the exercise of a general power only if the exercised power *passed* the appointed property. Accordingly, "the courts have been at pains to consider whether property passed under a general power or not so as to be taxable under Section 302(f)." *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 62.

It is submitted that the decisions in the reported cases, except the decision of the Court below in the instant case, establish that the property which went to the widow and

daughter did not *pass* under decedent's exercise of his general power of appointment. The most satisfactory way to review them seems to be to trace the development of the law as applied to varying sets of facts.

Case I

X makes a testamentary disposition of property as follows: in trust with income for life to Y and with a general power to Y to appoint the remainder; in default of appointment, remainder to Y's heirs at law. Y dies leaving A, B and C as his heirs at law. Y makes a testamentary appointment of the remainder in fee simple to A, B and C. They renounce their right to take under Y's will and elect to take under X's will, as in default of appointment by Y.

In 1935 upon substantially the foregoing set of facts, this Court held that the appointed property should not be included in the gross estate of the donee (Y) solely because, within the meaning of the "crucial words" of Section 302(f), no property passed to A, B and C as a result of the exercise of the power by Y. *Helvering* v. *Grinnell*, 294 U. S. 153.

In its unanimous opinion, this Court appeared to rely almost entirely on the appropriate state law to determine whether or not the property passed on the exercise of the power. There, as here, the applicable law was the law of New York. The Court quoted at some length from the leading New York case, *Matter of Lansing*, 182 N. Y. 238 (294 U. S. at 156-158).

The assumption that Congress must have intended that recourse be made to State law to determine whether property passes under the exercise of a power seems required by the circumstance that there was and is no general federal law that governs the passing of property. Property rights and the methods of their transfer are determined under our form of government by the applicable state laws. In *Helvering* v. *Stuart*, 317 U. S. 154, 161, this Court observed:

> "Grantees under deeds, wills and trusts, alike, take according to the rule of the state law."

The federal appellate courts and the Tax Court since the *Grinnell* decision by this Court have viewed local law as determinative. Thus, in *Legg's Estate* v. *Commissioner*, 114 F.(2d) 760, at 763, Judge Parker stated for the Court:

> "* * * questions as to the nature of the power of appointment and as to the property passing by the exercise of the power, must be answered by applying the law of Pennsylvania, as that is the state of the domicile of the donor of the power and the state wherein the property subject to its exercise is situate. * * * And the application of this rule is not affected by the fact that a question of federal taxation is ultimately involved; for while we look to federal decisions as authoritative in interpreting the federal statute imposing the tax, we look to the law of the state as laid down by its courts in determining whether there has been such a transfer of property as is subject to the tax under that interpretation. 'State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.' Morgan *v.* Commissioner, 309 U. S. 78, 626, * * * Leser *v.* Burnet, 4 Cir., 46 F. 2d 756; Dayton & Michigan R. Co. *v.* Commissioner, 4 Cir., 112 F. 2d 627, 630."

And see *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F.(2d) 758, 761.

In its very recent opinion in *Lewis* v. *Rothensies*,— F.(2d)—, decided September 1, 1943, the Court of Appeals for the Third Circuit had occasion to say:

> "Finally, the Collector argues that the meaning of the word 'passing' in Sec. 302(f) presents a question of federal law which should be determined without resort to local law. Of course, the construction of a federal statute raises a federal question. But for a federal court to interpret a word employed in a federal statute as calling for a recognition of property rights as governed by local law which regulates the title thereto is but giving federal effect to the word used. *There is no resort to local law for as-*

certaining the meaning of the word 'passing'. The federal courts, adopting as the legal definition of the word 'passing' the transfer of property rights according to the law of the sovereignty which regulates and secures the title thereto, then necessarily look to the local law to determine what rights have been so transferred." (Italics supplied).

Such an approach on the part of the Courts of Appeals for the Third and Fourth Circuits would not appear to conflict with the holding of the Court in *Morgan* v. *Commissioner*, 309 U. S. 78. One of the leading writers on this subject has said:

> "The only limitations upon the continued control of local property law suggested by the *Morgan* case are: (1) that state law cannot turn into a special power what the traditional terminology * * * would call a general power merely by labeling it 'special'; and (2) that the decision of a state court will no longer be binding *per se* upon federal tax authorities, but must be scrutinized for the answer to the question whether the law on which the decision is based is compatible with the federal definitions."
>
> Paul, *Federal Estate and Gift Taxation*, 430.

The Tax Court has similarly regarded itself as bound by the local law. *James C. Webster*, 38 B.T.A. 273, 289; *Lewis Spencer Morris*, 39 B.T.A. 570, 575; *Gertrude Bucknell Day*, 44 B.T.A. 524.

It is because of the approach of the foregoing cases that considerable emphasis herein will be placed on New York decisions.

Turning then to an application of the law of New York to Case I outlined above, it seems established beyond any doubt that under that law the property would be deemed to pass under the donor's will, not the donee's. *Matter of Lansing*, 182 N. Y. 238; *Matter of Chapman*, 133 App. Div. 337, app. dism. 196 N. Y. 561; *Matter of Duryea*, 277 N. Y. 310.

In the *Lansing* case, the Court stressed the concept that, inasmuch as the person in whose favor the power was exercised was the same person who would take under the donor's will, the donee's appointment "left the title where it was before, and the result is the same as if there had been no power to exercise" (p. 243). Although the Court stated that it sufficiently appeared that the appointee "elected to reject title" from the donee (p. 245), its determination is based only secondarily on this factor.

In connection with this point, Professor Griswold wrote concerning the *Grinnell* decision:

> "There is of course much to be said for this conclusion as a practical matter. It would indeed be an incongruous application of the statute which would make the question of taxability turn solely on whether the donee had in fact exercised the power, when the interests which followed the donee's death were in no way affected by the fact that it was exercised or not. That would make taxation almost wholly a matter of form; for the well informed donee would simply refrain from exercising the power if he wished the takers in default to have the property. Ordinarily, substantial taxes are not so easily avoided, nor so adventitiously incurred. But it may be that the incongruity is in the statute itself rather than in the decision which the Court might have made under it. The *Grinnell* case demonstrates the inadequacy of a statute which applies only to the exercise of a general power, and does not include the consequences of nonexercise as well."
>
> Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harvard Law Review 929, 935.

Thus it appears from the cases and leading comments that where, as under the facts outlined in Case I above, the exercise of the power does not result in a shifting of economic benefits, no property passes on the exercise of the power within the meaning of Section 302(f).

Such a view would not appear to be either unduly technical or dependent on the refinements of the conveyancer's art. On the contrary, it seems to recognize substance rather than form.

Case II

The factual situation is identical to that in Case I above, except that A, B and C do not renounce their right to take under Y's will.

The change of facts in Case II singles out this question: Is a renunciation by the takers under the exercise of the power of appointment a *sine qua non* to the doctrine developed in the New York law and echoed by the *Grinnell* decision? Judge Frank, in his opinion in the instant case, stated that his understanding of this Court's ruling in the *Grinnell* case was "that it was solely the renunciation which avoided tax" (R. 120). This view appears to be incorrect.

This Court did emphasize in its opinion in the *Grinnell* case that no property passed from the decedent where the donees refused to accept his gift. That point, however, does not appear to be the sole basis of the decision.

Professor Griswold has stated:

> "In the *Grinnell* case the appointees expressly elected not to take under the power. It does not seem that this is necessary to the result. If the basis of the case is that nothing 'passed' because the appointee already had an interest which simply was not taken away by the exercise of the power, that consequence is just as true whether the appointee elects or not. This conclusion is fortified by the fact that the Court expressly disapproved of the 'reasoning and conclusions' in two cases where there had been no election. It seems that the Court would rather have distinguished these cases if it had felt that the distinction had any validity."
>
> Griswold, *op. cit.*, at pages 935-936.

Judge Frank's decision does not appear to answer effectively either of the points suggested by Professor Griswold. He does, however, state that some language in this Court's opinion in the recent case of *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, indicates that this Court also believes that the *Grinnell* doctrine applies only in the event of a renunciation (R. 117-118). The answer would seem to be that the Court was not there presented with that precise question for determination, but referred to the *Grinnell* case merely as an example of how action taken by beneficiaries after their testator's death can have federal estate tax consequences; more simply yet, as Judge Learned Hand remarked in his concurring opinion in the instant case,

> "I cannot see that *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, sheds any light on the question."

To the same effect, see *Lewis* v. *Rothensies* (C. C. A. 3, September 1, 1943) —— F. (2d) ——.

With the exception of Judge Frank, the opinion of the federal appellate judges and of the members of the Tax Court seems to have been that renunciation was not a necessary part of the *Grinnell* doctrine. Thus in *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. (2d) 758, 761, the Court of Appeals for the Third Circuit stated, after referring to the *Grinnell* case:

> "If, therefore, the donee's exercise of the power was ineffectual, it can hardly be that the appointees' rejection of the donee's useless action was of controlling effect in determining whether the property passed in virtue of the donee's exercise of the power. The local law ruled the question as to the passage of the title regardless of the appointees' rejection of the donee's bequest."

To the same effect is *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760, 765.

The Tax Court's attitude has been that an election to take as in default of appointment under a New York will is a formal matter only and not material. *James C. Webster*, 38 B.T.A. 273; *Lewis Spencer Morris*, 39 B.T.A. 570.

Can it be said that renunciation is a necessary part of the New York rule which was reflected by the *Grinnell* case? It will be remembered that in the *Lansing* case, upon which the Court in the *Grinnell* case relied, a "renunciation" was implied from the fact that the donee resisted the imposition of the tax, but it seems fair to say that the New York court's chief reliance was placed on the following theory:

> "Mrs. McVickar was born before her grandfather died, and upon his death she took a vested interest in remainder, because she was 'a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate,' created in trust for the benefit of her mother. (1 R.S. 723, §13.) It was property which she could convey or devise. (Id. §35.) While she could not take possession until the death of her mother, the state could not deprive her of the property thus vested in her and she needed no consent from the state that her mother might make a will in order to enter into full enjoyment upon the termination of the precedent estate. Her rights were fixed by the will of her grandfather, and unless changed pursuant to its provisions her estate in expectancy would become an estate in possession upon the death of her mother. While the situation was subject to change under the power of appointment, no change was made. Although the power was exercised in form, her title was perfect without it and she derived no benefit from it. The power was to 'dispose of the remainder' and the remainder was not disposed of but continued where it was. The attempt to execute the power was not effective, because it did nothing. The exercise of a power which leaves everything as it was before is a mere form, with no substance." (182 N. Y. 238, 243-244)

The Court of Appeals of New York recently had occasion to say in *Matter of Duryea*, 277 N. Y. 310, 318-19:

> ". . . the true rule to be applied can be reached only by an entire disregard of any intention to elect or of what has been termed an election . . ."

Prior to the *Duryea* case there had been cases which had been substantially identical on their facts with Case II, wherein an express holding had been made that an election was not a necessary part of the *Lansing* doctrine. *Matter of Chapman*, 133 App. Div. 337, 340, app. dism. 196 N. Y. 561; *Matter of Chauncey*, 102 Misc. 378, 381-387; see Note, 52 Harvard Law Review 531.

Underlying these New York decisions is the settled doctrine that the takers in default of the exercise of the power—e. g., the widow and daughter in the instant case—A, B and C in Cases I and II—had vested remainder interests in the trust fund under the donor's will. The takers in default have a vested remainder even though it is subject to divestment by exercise of the power or by death prior to that of the donee of the power or to diminution by the birth of members of the same class. *Connolly* v. *Connolly*, 122 App. Div. 492; *Crackanthorpe* v. *Sickles*, 156 App. Div. 753. Particular support for this proposition has been found in the controlling sections of the New York Real Property Law.[1]

---

[1] Section 40 (formerly Section 30) provides:

> "A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

Section 41 (formerly Section 31) provides:

> "The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power."

Again stripping the factor of renunciation down to the ultimate inquiry into the shifting of economic benefits, it seems clear that whether or not renunciation is present makes not a particle of difference. To repeat the point made earlier, since the persons in whose favor the power is exercised take no more than what the donor gave them in default of the exercise of the power, no greater economic benefit is conferred upon them than if the donee had died without exercising the power.

This Court has "often recognized that the realities of the taxpayer's economic interest, rather than the niceties of the conveyancer's art, should determine the power to tax" and has pointed out "the relevance of this principle as a guide to statutory interpretation, where * * * the language of a statute and its statutory history do not afford more specific indications of legislative intent." *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 58, Note 1.

The rejection of the doctrine of renunciation as a determining factor is not, as has been seen above, the result of some nicety of the conveyancer's art. The converse appears to be true. Renunciations are present in some of the cases only because of what has been referred to as "abundant caution." Section 369(c) of the *Restatement of the Law of Property.*

Most simply stated, "they (renunciations) add nothing to what the particular local law otherwise confers." *Lewis* v. *Rothensies, supra.* Mr. Paul has remarked: "No wonder, then, that a stress on the idea of election results in creating new and virtually unsolvable enigmas." Paul, *op. cit.*, 459.

Case III

The factual situation is identical with that in Case II above, except that in his testamentary disposition of the property, Y appoint. 1/3 to A, 1/3 to B, and 1/3 to D, who is not an heir at law of Y (all in fee simple).

The foregoing set of facts singles out from the facts in the instant case this question: Is the non-inclusion of the donee's son who would have shared equally with the donee's widow and daughter under the will of the donor in default of the exercise of the power, and the appointment of the son's share to the grandson, a stranger under the default provision of the donor's will, a sufficient reason to hold that therefore the widow and daughter cannot be deemed to take under the will of the donor?

In his opinion herein, Judge Hand answered the foregoing question in the affirmative (R. 121-122). However, he did not look to the law of New York for his answer, and he did not correctly assay the donee's purpose.

The law of New York is clear on this point. In *Matter of Duryea*, 277 N. Y. 310, the Court passed on the facts presented by Case III. There the persons designated by the donor to take in default of the exercise of the powers of appointment were the donee's two children. The donee appointed one-half of the trust funds to one child, Lisa W. Heighe, but excluded the other, Robert H. Heighe; the other half of the trust funds was appointed to a stranger under the donor's default provisions, Baronig Baron.

On these facts the Court of Appeals stated:

> "The question is whether Lisa W. Heighe, under the peculiar facts of this case, did take the share she would have taken under the will of Ellen W. Duryea. It is contended on the part of the appellants that she took more under the power of appointment than she would have taken by an election to take under the will of Ellen W. Duryea. Conceding the validity and

effectiveness of the appointment of half of each of the funds to Baronig Baron, it is said that if she renounced her appointment only half of the two funds would remain to be distributed under the Duryea will and the one-half would be required to be divided between Lisa W. Heighe and the appellant, Robert H. Heighe.

* * * *

"The question is not what Lisa W. Heighe would take if she renounced her rights to take by the appointment made and elected to take under the will of the donor of the power, but rather what she would have taken had the power not been exercised to any extent. In that case she would have taken one-half under the will of the donor. The donee of the power might have said, 'I give to Lisa W. Heighe the share which she would have taken under the will of Ellen W. Duryea and to Baronig Baron the share which Robert H. Heighe would have taken.' That would have been a good appointment, would have precluded Robert H. Heighe from taking a share in the trust estate under the Duryea will and would have given to Lisa W. Heighe exactly what she would have taken under the Duryea will had no appointment been made. While the donee of the power did not mention the fact that such was the disposition she was making of the fund, it is entirely clear that such was the intent and effect of the appointment made. It must, therefore, be held that Lisa W. Heighe takes no more under the appointment than she would have taken had no appointment been made and the principle set forth in the cases above cited is applicable, namely, that she is deemed to take under the will of the donor rather than under the appointment made by the donee."

Matter of Duryea, supra, 318-320.

The result reached in the *Duryea* case followed the law established by the earlier New York cases. *Matter of Slosson*, 216 N. Y. 79; *Matter of Ripley*, 122 App. Div. 419, aff. 192 N. Y. 536.

In *James C. Webster*, 38 B. T. A. 273, the Tax Court passed on the federal estate tax consequences of the *Duryea* case noted above. In an opinion which was reviewed by the Tax Court, it was stated (at page 289):

> "We regard the conclusion of the New York Court of Appeals as determinative of property rights 'under established principles of law' and as controlling here on the point of whether Lisa Heighe received the same property rights under the power as under the will of the donor of the power . . . We conclude, therefore, that no property passed to Lisa Heighe when decedent exercised the power of appointment because the exercise of the power left her property rights just as they were before."

Judge Hand referred to the Restatement of the Law of Property but did not indicate that it was opposed to his view. Section 369, Illustration 5.

Even if the New York law be held not controlling, it is persuasive authority to support a holding that the property taken by the widow and daughter in the instant case should still be deemed to pass under the donor's will even though the grandson admittedly took from the donee. Certainly it appears that the donee's intention was to have the property pass in the same shares as would have resulted under the donor's will except that he intended the son's share to go to the grandson, and the wife's and daughter's shares to be held in trust for them.

Again, it appears that even under Case III, no greater economic benefit passed to the widow and daughter than they would have received in the admittedly tax free situation where the power had not been exercised at all.

Case IV

The factual situation is identical with that in Case III above, except that Y appoints one-third of 6.667% of the trust fund outright and a life interest in one-third of the balance thereof to A and to B; and he appoints the remaining one-third of the balance as well as of the 6.667% thereof outright to D.

With Case IV, we reach the facts of the instant case. For it involves the exercise of a general power where no renunciation is made, where part of the fund is appointed to a stranger who would not have taken under the donor's default provisions and where two of the three parties who would take in fee under a default are appointed a much smaller fee interest and a life interest in trust.

Judge Learned Hand in his concurring opinion pointed to the change in the nature of the estates taken by the widow and daughter—life interest in trust instead of a fee interest—as a further reason why "it cannot be said that they took under the will [of the donor]" (R. 121). Here too the premises of his conclusion appear unsound. Just as in deciding the effect of the one-third appointment to the grandson instead of the son, discussed above, he ignores the answer which the courts of New York have made as to the effect of the creation of the life estate. Further, he appears to be viewing the argument as one concerning whether or not the general power of appointment was exercised. Thus, he states:

> "* * * there was no way other than by exercising the power that the donee could have changed the jural quality of what passed to his wife and daughter under the will." (R. 120)

This statement may be entirely correct but it is not directed to the question presented, namely, whether any additional

economic benefits (any property) passed to the wife and daughter by the exercise of the power.

It is, we believe, legally and mathematically obvious that a life interest in the income of property in trust is a lesser interest than a fee simple interest in the same property. Thus, in the instant case, what the widow and daughter received was a lesser interest than they would have received under the donor's will in default of appointment.

The courts of New York have repeatedly held that where the taker receives the same *or a lesser interest* from the donee he takes his title from the donor. In *Matter of Duryea, supra*, the Court of Appeals stated (277 N. Y. 310 at 318-319):

> "As has been suggested by the learned Surrogate in his opinion in this case, the true rule * * * may be stated to be that where a person named under the exercise of the power takes the same or less than he would have taken under the original Will, if the power of appointment had not been exercised, his interest is taxable in the estate of the donor and not in the estate of the donee."

In *Matter of Tuckerman*, 130 Misc. 806, at 808, Surrogate Foley thought it well settled that "as the appellants received less under the will of the decedent than they would take under the deed and will of the donor, the exercise of the power is ineffectual, and the property passes under the donor's will and deed." To the same effect, see *Matter of Vanderbilt*, 163 Misc. 667 at 669-670.

The recent case of *Matter of Lichtenstein*, 177 Misc. 320, appears closely in point. There the Surrogate declared (at pages 326-327):

> "The holding that the appointment is valid makes necessary consideration of the consequences flowing from the fact that the appointees take less under it than they would have taken if the power had not been exercised at all. Obviously they take less since they are deferred in possession of capital (until they reach

specific ages) under the appointment, whereas under the donor's will they would have taken in possession immediately on the donee's death, failing exercise by him of the power to appoint. * * * The precise question, however, was considered by the Federal courts (*Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. (2d) 758; *Legg's Estate* v. *Commissioner of Internal Revenue*, 114 id. 760). In each of these cases it was held that the appointment of an equitable estate under a general power to appoint a fee permitted the appointee to take in the donor's estate. These cases are discussed in 41 Columbia Law Review (pp. 149-155). The principle applied in these Federal cases is that if the gift to the appointee is within the compass of the gift authorized by the donor of the power the legatee may take it in the donor's estate though it does not match precisely the terms of the alternative gift by the donor. That a general power includes a power to appoint an equitable estate has been settled in this department in *Matter of Hart* (262 App. Div. 190). On these authorities the court holds that the appointees may take in the donor's estate."

In *Matter of Canda*, 114 Misc. 161, reversed on other grounds, 197 App. Div. 597, the court held that where the donee's exercise of her powers of appointment was in favor of her trustees with life estates to her children and where the transfer to the children was part only of what they would have received under the donor's will in default of exercise, the appraiser erred in including the value of the life estates as taxable.

Conversely, it has been declared to be the law of New York that "where under the will of the donee additional benefits are derived by his appointees, the property passes under that will . . .". *Matter of Taylor*, 121 Misc. 7, 8, citing authorities. What "additional benefits" can it be said that the widow and daughter received in the instant case? The fact is that the bundle of rights provided for them by the donor was very materially diminished by the donee.

The Courts of Appeals for the Third and Fourth Circuits recently passed on closely similar fact situations where life estates were carved out of fee interests by appointments governed by the law of Pennsylvania, but reached a conclusion opposite to the Court of Appeals in the instant case. In *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, the Circuit Court of Appeals for the Third Circuit stated (112 F.(2d) at p. 763):

> "What therefore, of the devise over in default of appointment, remains undivested after the donee's exercise of the power passes under the will of the donor. As the whole includes all of its parts so does a fee embrace all of the estates that may be carved therefrom. Consequently, the effect of Mrs. Hopper's appointment to her children of an undivided one-fifth interest to each in the equitable estate in the property for life instead of an undivided one-fourth to each in the legal estate in fee, * * * was merely to limit and thus reduce the extent of her children's already vested estates under the will of their grandfather and from whose will they derived their title."

In *Legg's Estate* v. *Commissioner of Internal Revenue*, the Circuit Court of Appeals for the Fourth Circuit said (114 F.(2d) at p. 765):

> "When the power was exercised by the donee, the result was, not that property passed thereby to Mildred Webster Legg, but that the estate which had previously vested in her was cut down from a fee simple interest in the whole to an equitable life estate in a part. What was taken away from her by the exercise of the power passed under the power, but not what was left. That had already vested in her under the will of her grandfather, the original donor."

The foregoing decisions are in conflict both as to their reasoning and their conclusions with the Circuit Court of Appeals' decision in the instant case. For a very recent

consideration and rejection of the views of the Second Circuit, see *Lewis* v. *Rothensies, supra.*

In conclusion, it is submitted that viewing the real effect of the exercise of the power, rather than its form, no economic benefits were here shifted to the widow and daughter that would not have been shifted to them had the donee failed to exercise the power.

If dissatisfaction is expressed with the result being urged here, namely, a smaller estate tax than the Commissioner has sought, is not the answer that the remedy is legislative? That is, may it not be that, as suggested by Professor Griswold (page 10, *supra*), the incongruity, if indeed there is one, is in the statute itself? What the Commissioner in effect appears to be seeking is the inclusion of the appointed property wherever a general power has been exercised. The difficulty with that view, as noted by this Court in the *Grinnell* case, is that it seeks a virtual obliteration of "passing" from the "crucial words" of Section 302(f).

Congress completely revised the power of appointment section in the Revenue Act of 1942. While the new law requires the inclusion in the estate of a decedent of all property over which he has a power of appointment at death, whether or not exercised and whether or not "general" or "special" in scope, such a power does not include a power to appoint to the spouse of the donor, to descendants of the donor (other than the donee), to the spouse of the donee, to descendants of the donee, or to charities. The new law further permits the release of a general power of appointment in part so as to restrict its exercise to the class of persons mentioned. Thus, if decedent had died while the present provisions of the Internal Revenue Code were in force, he could have released the power to appoint to all persons other than descendants of the donor and their spouses and exercised the power in question, as he did, without the imposition of any tax upon his estate, as compared with an admitted tax under the old law on property

of the value of $4,788,837.60. Even under present-day thinking, the instant case does not present an example of tax evasion.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit was in error and should be reversed.

Respectfully submitted,

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